

Tulsa Law Review

Volume 29
Issue 2 *Native American Symposia*

Winter 1993

The Response of the Cherokee Nation to the Cherokee Outlet Centennial Celebration: A Legal and Historical Analysis

Chadwick Smith

Faye Teague

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Chadwick Smith, & Faye Teague, *The Response of the Cherokee Nation to the Cherokee Outlet Centennial Celebration: A Legal and Historical Analysis*, 29 Tulsa L. J. 263 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol29/iss2/13>

This Native American Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

THE RESPONSE OF THE CHEROKEE NATION TO THE CHEROKEE OUTLET CENTENNIAL CELEBRATION: A LEGAL AND HISTORICAL ANALYSIS*

Chadwick Smith†
Faye Teague‡

Summary Overview	264
I. INTRODUCTION	265
A. <i>Historic Parallel</i>	265
B. <i>Definition of Cherokee Outlet</i>	267
C. <i>Objection to Celebration of the Cherokee Outlet Cession</i>	267
II. BRIEF EARLY HISTORY OF CHEROKEE NATION	269
A. <i>Background</i>	269
B. <i>Basis of Cherokee Outlet</i>	270
III. ACQUISITION OF THE OUTLET	270
A. <i>Treaty of May 6, 1828</i>	270
B. <i>Act of May 28, 1830</i>	271
C. <i>Treaty of February 14, 1833</i>	272
D. <i>Treaty of December 29, 1835 (New Echota)</i>	272
E. <i>Patent of December 31, 1838</i>	273
F. <i>Treaty of August 6, 1846</i>	274
G. <i>Treaty of July 19, 1866</i>	275
H. <i>Conclusion as to Ownership of Outlet</i>	275
IV. SETTLEMENT OF OTHER INDIANS IN THE OUTLET	276
A. <i>Provisions in Treaty of 1866</i>	276

* We thank Dr. Rennard Strickland, American Indian Law and Policy Center, University of Oklahoma, Norman, Oklahoma, for his invaluable comments to earlier drafts of this article.

† Prosecuting Attorney for the Cherokee Nation and Cherokee legal historian. B.S. Ed. 1973, University of Georgia; M.S. (Public Administration) 1975, University of Wisconsin; J.D. 1980, University of Tulsa.

‡ Intern, Cherokee Nation Office of Justice, Tahlequah, Oklahoma. B.S. 1962, Master of Teaching 1964, Northeastern State University (Oklahoma); J.D. 1994, University of Tulsa.

B.	<i>Extent of Settlement of Indians in Outlet.....</i>	278
C.	<i>Price to be Determined by Appraisal of the Outlet ...</i>	279
D.	<i>Requests for Payment for Entire Outlet or Restoration to Cherokee Nation</i>	280
E.	<i>United States' Response to Request for Payment</i>	281
V.	LEASE OF OUTLET TO CHEROKEE STRIP LIVE STOCK ASSOCIATION	283
A.	<i>First Lease and Early Attempts to Tax Cattle</i>	283
B.	<i>Second Lease</i>	285
C.	<i>Offers to Buy the Outlet</i>	286
D.	<i>Opposition to Leasing of Outlet</i>	287
VI.	EFFORTS TO ACQUIRE OUTLET FOR WHITE SETTLEMENT.....	289
A.	<i>Commission Appointed by United States to Negotiate with Indians</i>	289
B.	<i>Cherokee Negotiators Appointed.....</i>	290
C.	<i>Reasons Negotiations Were Slow</i>	290
D.	<i>Opinion and Proclamation Voiding Leases in Outlet</i>	291
E.	<i>Other Events Leading to "Agreement"</i>	292
VII.	INEVITABILITY OF LOSS OF THE OUTLET	293
A.	<i>The Jerome Commission</i>	293
B.	<i>Threats to Take the Outlet Without Consent</i>	294
C.	<i>"Agreement" Reached</i>	295
D.	<i>Cherokee Outlet Act Finally Passed</i>	297
E.	<i>Cession of Outlet</i>	298
VIII.	POST-OUTLET-RUN CONSIDERATIONS	298
A.	<i>Removal of Intruders</i>	298
B.	<i>The Effects of the Curtis Act</i>	299
C.	<i>Recognition of Tribal Rights and Payment of the Cherokee Outlet</i>	299
IX.	CONCLUSION	300

SUMMARY OVERVIEW

The attached legal and historical analysis explores the events which led to the loss of the Cherokee Outlet. The facts, as outlined herein, are basically clear and not generally in dispute. In 1961, the Indian Claims Commission, after reviewing all of the relevant documents concluded that the Cherokee Nation had been "subject to duress in obtaining from them a cession of the [Outlet] tract." The

Commission found as a matter of law that “there was no arm’s length bargaining between the parties.”

The history of the Cherokee Outlet is reviewed in this study through the series of treaties and agreements negotiated between the Cherokee Nation and the United States. The extralegal efforts which forced the Cherokee Nation to surrender the Outlet are examined in detail. From these and other documents, the authors determine that the sale of the Cherokee Outlet was no sale but was official extortion¹ designed to appease the clamor of greed for land. The Outlet was not taken by force but by the blatant abuse of trust by the Executive and by the Congress. The Outlet loss reflects tragically upon morality and law in nineteenth century Indian-white relations.

I. INTRODUCTION

A. *Historic Parallel*

Tragic events of Cherokee history seem to attract “celebration” and “commemoration” often from the well-meaning. The September 1993 “celebration” of the Cherokee Outlet Centennial has a remarkable parallel with the 1938 “commemoration” of “the Trail of Tears,” known by the celebrators of Tennessee, Georgia and Alabama as “the one-hundredth anniversary of peace between its pioneers and the Indians of the Cherokee race.”

On June 10, 1938, the United States Congress passed a Joint Resolution that in part provided in the preamble:

To authorize an appropriation to aid in defraying the expenses. . . and [to] commemorate the one-hundredth anniversary of the removal from Tennessee of the Cherokee Indians, at Chattanooga, Tennessee and at Chickamauga, Georgia, from September 18 to 24, 1938, inclusive; and for other purposes.²

The text of the Joint Resolution provided in part:

Whereas September 18 to 24, 1938, inclusive, marks. . . the one-hundredth anniversary of peace between the Cherokee Indians and the pioneers of Tennessee, Georgia, and Alabama * * * Whereas it

1. Official extortion is the obtaining of property from another with his consent, induced by wrongful use of force or fear, or under color of official right. 18 U.S.C.A. § 872 (West 1976); 18 U.S.C.A. § 1951(b)(2) (West 1984). See also OKLA. STAT. ANN. tit. 21, § 1481 (West 1983) (similar state definition).

2. H.J. Res. 667, 75th Cong., 3d Sess. (1938). This resolution also provided for observance of the seventy-fifth anniversary of several civil war battles.

is fitting that the Nation by appropriate ceremonies should commemorate the one-hundredth anniversary of peace between its pioneers and the Indians of the Cherokee race * * * Sec. 3. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$35,000, or so much as thereof as may be necessary, for use by the commission in defraying expenses necessary for and incident to said observance. . . .³

One should be reminded that beginning in 1838, the Cherokee Nation and its people were forcibly removed from their homeland in Georgia, Tennessee, Alabama and North Carolina. Four thousand Cherokees died during this forcible removal.⁴ Ten thousand more Cherokees would have been alive in 1840 but for the Trail of Tears, according to the Cherokee demographics analysis of Russell Thornton.⁵

For the majority of Cherokees, the Trail of Tears is still an open wound. It may be easy for Georgia, Tennessee and Alabama to "celebrate" peace with the Cherokees since it was those states that forcibly expelled the Cherokees. It is easy to have peace with a people no longer present. The white celebration in 1938, of the effectiveness of the removal poured salt in that historic but still open wound. The relevant point is the observation of how easy it was for the U.S. Congress and the states of Georgia, Tennessee and Alabama to disguise the Trail of Tears, one of the darkest and most sinister pages of American history, with a celebration couched in terms of peace with the Cherokees. It is this absolute blindness to history and arrogant insult to the Cherokees in 1938, that is worthy of note. Where was the conscience of America in 1938? Where was the disclosure of the truth regarding the Trail of Tears as a modern American Holocaust? Where was the voice of fairness? Where in the 1938 celebration was the anchor of reality? The simple and clear observation from a Cherokee perspective about the 1938 celebration was that it was a little more than the gloating of a bully.

That concept and example of Cherokee history brings into focus the Cherokee Nation's response to the "Centennial Celebration" of the Cherokee Outlet Run. For many Cherokees and other Indians,

3. *Id.*

4. RUSSELL THORNTON, *THE CHEROKEES: A POPULATION HISTORY* 74 (1990); *see generally* CHARLES C. ROYCE, *THE CHEROKEE NATION OF INDIANS* 170-78 (1975).

5. THORNTON, *supra* note 4, at 76; *see generally* CHEROKEE REMOVAL: BEFORE AND AFTER (William L. Anderson ed., 1991).

the Outlet Celebration represents another dark moment—an abandonment of morality, a denial of law and the personification of greed.

B. *Definition of Cherokee Outlet*

The Cherokee Outlet is often referred to as the Cherokee Strip. In fact, the Cherokee Strip was a four mile wide tract of land on the southern border of Kansas. It was the subject of a surveyor's error and was ceded to the United States in the Treaty of 1866.⁶ The Cherokee Outlet is the perpetual outlet west of the Cherokee Nation taken from the Cherokee Nation in the Act of March 3, 1893, the Dawes Act.⁷ The Cherokee Outlet contains 8,144,722.35 acres or 12,726 square miles, all of which was lost to the federal government.⁸ Hereinafter, this tract is referred to as the "Cherokee Outlet." An additional seven million acres generally known today as the Cherokee Nation is all or part of the fourteen northeastern counties of the State of Oklahoma. This tract is hereafter referred to as the "Cherokee Nation proper."

C. *Objection to Celebration of the Cherokee Outlet Cession*

The one hundredth anniversary of the Cherokee Outlet Run was designed by the Oklahoma Tourism and Recreational Department as a year long gala event. At least nineteen western Oklahoma communities organized over sixty-seven events celebrating the Outlet Run. Reenactments occurred, congratulations were published praising the early "pioneers," and hundreds of thousands of dollars were spent in promotion of the anniversary of the event.⁹ A glossy three color brochure stated the general tenor of the events:

Oklahoma's Cherokee Strip [Outlet] is one of the few places where the pioneer spirit that settled America is still vibrant enough to experience. Feel it in the wind that sweeps through tallgrass prairies and fields of wheat. See it in the faces of those who live and work on the land their ancestors dreamed of owning when they mounted their horses, buggies and even bicycles to make the last great race for land on September 16, 1893.

6. Treaty of July 19, 1866, 14 Stat. 799

7. Dawes Act, ch. 209, 27 Stat. 612 (1893) (current version 25 U.S.C. §§ 331-355).

8. Royce, *supra* note 4, at 256 n.a.

9. See the map size "1893 Centennial Cherokee Strip 1993" brochure printed by the Oklahoma Tourism and Recreational Department, P.O. Box 60789, Oklahoma City, Oklahoma 73146.

A focal point of the Outlet Celebration was a statue erected in Ponca City commemorating the land runners. The Ponca Tribe objected to the erection of the statue originally titled "This is My Land," which portrays a pioneer on a horse having made the Cherokee Outlet Run and staking his claim. For some Indians, the statue and the celebration of the Cherokee Outlet Run, like the 1938 Celebration of the Trail of Tears, was bitterly ironic. For others, it represented graphically a historical reality—the recurring lust for land by the white man. The Cherokee Nation believes that the public should understand these events within the context of Cherokee history. Historic truth is the best tool to build understanding. When people understand the historic happenings behind the Cherokee Nation's loss of her Outlet lands, they will appreciate the Cherokee Nation's view of this loss as a tragic event which civilized people would not choose to celebrate.

The Principal Chief of the Cherokee Nation and the undersigned agreed with the Ponca Tribe's objection. The statue, "This is My Land," failed to recognize that the Cherokee Outlet was wrongfully taken from the Cherokee Nation by bureaucratic, presidential and congressional "extortion" and was the first step to the decline of the Cherokee Nation as an Indian republic guaranteed by twenty-two treaties with the federal government.

The objection to the Cherokee Outlet Celebration is that the whole story is not told. The Oklahoma Department of Tourism's brochure personifies the situation. It states that the Outlet run "... is a story the people of the today's Cherokee Strip [Outlet] will bring to life during 1993." In the middle of all the gala fervor of the Outlet, there is a silence. It is the silence of the untold Cherokee perspective of the Outlet story. If the whole story were told, there would be no reason to celebrate.

It is easy to see the parallel between the 1938 Trail of Tears Celebration by Tennessee, Georgia and Alabama and the 1993 Cherokee Outlet Celebration by Oklahoma. Like the 1938 Trail of Tears Celebration, the Cherokee Outlet Run Celebration is blind to fact and ignores a fundamental wrong done to the Cherokee Nation. David Stannard in his book "American Holocaust" refers to an attitude by European and American historians as "stubbornly determined ignorance." For reasons which follow, it is submitted that common to the

1938 Trail of Tears Commemoration and the 1993 Cherokee Outlet Celebration is the attitude of "stubbornly determined ignorance."¹⁰

II. BRIEF EARLY HISTORY OF CHEROKEE NATION

A. Background

The Cherokees, who were located in the southeastern part of the United States, primarily in the Carolinas, eastern Tennessee, Kentucky, Virginia and northern Georgia, began their protracted retreat and suffered the gradual erosion of their territorial land base from their very first treaty with European colonists. The first cession was found in the Treaty of 1721 with South Carolina, in which the Cherokee Nation ceded a tract in South Carolina. For the next sixty years, in almost all of the subsequent nine treaties with the colonies or Great Britain, the Cherokees ceded other large tracts of land.¹¹

The Cherokees fared no better when they began to treat with the United States. In the first treaty with the United States, the Treaty of Hopewell in 1785, the purpose of which was to "give peace to all the Cherokees, and receive them into the favor and protection of the United States," the Cherokees ceded additional lands.¹² From 1721 through 1866, an unbelievable 81,220,374 acres or 126,906 square miles were lost by the Cherokee Nation through treaties.¹³

Early Cherokee factions seemed to be divided according to topography into regional communities.¹⁴ After the Revolutionary War, the Lower Cherokees in a visit with President Jefferson expressed their desire to move west of the Mississippi where they would not be encroached upon by white settlers. The Upper Cherokees during the same visit expressed a desire to remain on their lands now located primarily in Georgia, with lesser amounts in Tennessee and Alabama.¹⁵

The Lower Cherokees sent an exploring party to Arkansas at President Jefferson's suggestion to find a tract of country suitable to

10. As an example see the inside cover of Oklahoma's 1993 Calendar of Events published by the Oklahoma Tourism and Recreation Department, Travel and Tourism Division where it says regarding the Cherokee Outlet Run, "Come help us celebrate the largest, most spectacular competitive event in history and a way of life that can only be found in the great state of Oklahoma."

11. ROYCE, *supra* note 4, at 16-24.

12. Treaty of Hopewell, Nov. 28, 1785, Preamble & art. IV, 7 Stat. 18, 19.

13. ROYCE, *supra* note 4, at 256.

14. *Id.* at 14.

15. Cherokee Nation v. United States, 109 F. Supp. 532, 533 (Ct. Cl. 1953).

them.¹⁶ After they had found a suitable place, the Treaty of 1817 was concluded with the entire Cherokee Nation in which the United States agreed to give as much land in Arkansas as the Cherokees ceded east of the Mississippi.¹⁷ Later, a representative of the Cherokees, in a communication to the government, said that Major General Andrew Jackson, one of the government's negotiators, had told them that they were to have a perpetual outlet to the west from their new lands in Arkansas.¹⁸ However, there was no mention of such an outlet in the treaty.

B. *Basis of Cherokee Outlet*

The Old Settlers, as the Lower Cherokees came to be called, wanted a clarification of their new holdings in Arkansas. Hearings were held in 1818, and President James Monroe said to the Cherokee delegation, "It is my wish that you should have *no limits to the West*, so that you may have good mill-seats, plenty of game, and not be surrounded by the white people."¹⁹ The Indian superintendent in St. Louis was told that the Cherokees desired "to secure an indefinite outlet west," and he was instructed to secure from the Osages, who held the land, the concession of the privilege.²⁰

III. ACQUISITION OF THE OUTLET

A. *Treaty of May 6, 1828*

The Cherokee Outlet was first mentioned in a treaty in the Articles of a Convention, a treaty concluded on May 6, 1828, between the Old Settlers and the United States.²¹ The Old Settlers had been in Arkansas for just a short time when Arkansas Territory was formed in 1819, plans for statehood began, and Arkansas citizens wanted to settle the lands of the Old Settlers.²² It was a familiar song with a different verse. The Old Settlers were compelled to exchange their land in Arkansas for land in what was then known as Indian Territory. The desire of the United States was set forth in the preamble to the 1828 treaty:

16. *Id.*

17. Treaty of July 8, 1817, art. 5, 7 Stat. 156, 158.

18. Cherokee Nation v. United States, 109 F. Supp. 238, 239 (Ct. Cl. 1953).

19. Berlin B. Chapman, *How the Cherokees Acquired the Outlet*, 15 CHRON. OF OKLA. 30, 32 (1937) (emphasis added).

20. ROYCE, *supra* note 4, at 93-94.

21. Treaty of May 6, 1828, art. 2, 7 Stat. 311, 311-12.

22. GEORGE RAINEY, *THE CHEROKEE STRIP* 32-33 (1933).

“WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, a permanent home, and which shall, *under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State.*”²³

Article 2 of the treaty solemnly pledged to the Cherokees seven million acres of land and defined the boundaries of that land. The Treaty guaranteed “a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extend.”²⁴ The Cherokee Outlet was exchanged for certain tracts of the Cherokee’s land east of the Mississippi.²⁵

B. *Act of May 28, 1830*

The Act of May 28, 1830, known as the “Indian Removal Act,”²⁶ “was an act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west” of the Mississippi. Section 3 provides the following:

And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same.²⁷

It was this act that gave President Andrew Jackson the authority to negotiate removal of the Cherokees to Indian Territory and established the United States’ Indian policy.

23. Treaty of May 6, 1828, Preamble, 7 Stat. 311 (emphasis added).

24. *Id.* at 311-12.

25. *Id.* at 313.

26. Act of May 28, 1830, ch. 148, 4 Stat. 411.

27. *Id.* at 412.

C. *Treaty of February 14, 1833*

Language guaranteeing the seven million acres and the perpetual outlet west appear both in the preamble and Article I of the Articles of Agreement and Convention Treaty made on February 14, 1833,²⁸ a treaty also between the Old Settlers and the United States. An important provision in Article I, finding its origins in Indian Removal Act, states that "letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed [sic]."²⁹

D. *Treaty of December 29, 1835 (New Echota)*

Removal of the remaining Cherokees east of the Mississippi was being sought by almost any means possible. One delegation of Cherokees led by John Ridge was willing to remove. The delegation reached an agreement with John G. Schermerhorn. According to a memorandum dated February 28, 1835, concerning the agreement from Secretary of War Lewis Cass, the United States again agreed to grant to the Cherokees the outlet west for their unconditional use.³⁰ Finally, by means of the "fraudulent" Treaty of New Echota of 1835,³¹ the Cherokees were forced to remove to Indian Territory in the winter of 1838-1839.³² Major William M. Davis who had been appointed as an agent for the enrollment of the Cherokee wrote to the Secretary of War:

Sir, that paper. . . called a treaty is no treaty at all, because [it was] not sanctioned by the great body of the Cherokees and made without their participation or assent. I solemnly declare to you that upon its reference to the Cherokee people it would be instantly rejected by nine-tenths of them and I believe by nineteen-twentieths of them. * * * The delegation taken to Washington by Mr. Schermerhorn has no more authority to make a treaty than any other dozen Cherokees accidentally picked up for that purpose. . . .³³

28. Articles of Agreement and Convention, Feb. 14, 1833, art. 1, 7 Stat. 414, 415. This treaty was necessary because the Treaty of May 6, 1828, had resulted in overlapping boundaries between the Cherokee and Creek Nations. The boundary dispute had been settled amicably between the tribes, and the purpose of this treaty was to confirm the agreement. *Id.*

29. *Id.* at 415.

30. Chapman, *supra* note 19, at 40 & n.32 (citing S. Doc. No. 120, 25th Cong., 2d Sess. 97-100).

31. Treaty of New Echota, Dec. 29, 1835, art. 16, 7 Stat. 478, 485.

32. GRACE STEELE WOODWARD, *THE CHEROKEES* 193, 205, 214-219 (1963).

33. ROYCE, *supra* note 4, at 163.

This treaty was the basis for the infamous Trail of Tears. In Article 1, the Cherokees relinquished to the United States all their lands east of the Mississippi.³⁴

In Article 2, the Cherokees received land west of the Mississippi in exchange for the land already guaranteed the Old Settlers by the Treaty of May 6, 1828, and the supplementary Treaty of February 14, 1833.³⁵ This land included not only seven million acres of the Cherokee Nation proper but also “a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.”³⁶ Article 2 further states that “letters pattent [sic] shall be issued by the United States as soon as practicable for the land hereby guarantied [sic].”³⁷ Additional land was conveyed by patent, in fee simple; this land was eight-hundred-thousand acres of land, which was part of the Osage Reserve in Kansas, and sometimes known as the Neutral Lands. This land was included because the Cherokees believed that the seven million acres plus the outlet was not sufficient for the accommodation of the whole nation.³⁸

Clear and unambiguous language in Article 3 gives the Cherokee Nation all the land in fee patent. Article 3 states in part:

The United States also agree that the lands above ceded by the treaty of Feb. 14 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28[,] 1830.³⁹

Article 5 covenants that “the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.”⁴⁰

E. *Patent of December 31, 1838*

A fee patent was issued to the Cherokees on December 31, 1838, with the following recitals:

34. Treaty of New Echota, Dec. 29, 1835, art. 1, 7 Stat. 478, 479.

35. *Id.* at 479.

36. *Id.* at 479-80.

37. *Id.* at 480.

38. *Id.*

39. *Id.*

40. *Id.* at 481.

Whereas by certain treaties made by the United States of America with the Cherokee nation of Indians of the sixth of May, one thousand eight hundred and twenty-eight; the fourteenth of February, one thousand eight hundred and thirty-three; and the twenty-ninth of December, one thousand eight hundred and thirty-five, it was stipulated and agreed on the part of the United States that, in consideration of the promises made in the said treaties, respectively, the United States should guarantee, secure, and convey by patent to the said Cherokee Nation certain tracts of land; the descriptions of which tracts and the terms and conditions on which they were to be conveyed are set forth in the second and third articles of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five. . . (Col. 9, Records of Patents, G. L. O., p. 34.).⁴¹

The granting clause of the patent states that "in execution of the agreements and stipulations contained in said several treaties," Cherokee Nation is granted the land "with the rights, privileges, and appurtenances thereunto belonging to the said Cherokee Nation forever," subject to the right reserved by the United States to permit other Indians to procure salt, to all other rights reserved by the United States, and to the condition of reversion provided by the Act of May 28, 1830.⁴²

The undisputed principle of property law is that a fee patent gives the grantee absolute and unconditional ownership in the subject property. There is no higher degree of land ownership in Anglo-American law.

F. *Treaty of August 6, 1846*

This 1846 treaty was essentially a four-party peace treaty between three factions of the Cherokees, the Old Settlers, the National Government and the Treaty Party and the United States to end an internal Cherokee Civil War.

The same guarantees of a patent for the Cherokee Nation proper and the Cherokee Outlet are repeated in Article I of the Treaty with the Cherokees on August 6, 1846, and include the familiar language from Article 3 of the Treaty of 1835 and Section 3 of the Act of May 28, 1830:

[T]o assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors, the country so exchanged with them;

41. S. Ex. Doc. No. 63, 52d Cong., 1st Sess. 4 (1892).

42. *Id.*

and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same.⁴³

G. *Treaty of July 19, 1866*

This treaty was seen as a retribution treaty against the Cherokee Nation for its alliance with the Confederacy during the American Civil War.⁴⁴ Article 31 of the treaty reaffirmed all previous treaties not inconsistent with the 1866 treaty.⁴⁵ Therefore, the provisions and covenants of the treaties of 1828, 1833, 1835, and 1846, were all reaffirmed and continued as binding on the Cherokee Nation and the federal government. Ownership of the outlet land was thus reaffirmed.

H. *Conclusion as to Ownership of Outlet*

The facts are clear. The Treaty of May 6, 1828, guarantees an outlet west. The Treaty of February 14, 1833, clarifies boundary disputes of the Treaty of May 6, 1828, and adds language that the United States will issue a patent for the land guaranteed. The Act of May 28, 1830, allows the President to exchange lands with the Indians and issue patents for that land. The 1835 Treaty of New Echota provides for conveyance of the outlet and states that all the lands will be included in one patent executed to the Cherokee Nation. The patent was executed on December 31, 1838.⁴⁶ An affirmation of these guarantees is found in the Treaty of August 6, 1846. The Treaty of July 19, 1866, once again reaffirmed all of the prior treaties. Even more importantly, the federal appellate courts and the United States Supreme Court have consistently held that the Cherokee Nation had a fee simple title to the Cherokee Outlet lands.⁴⁷ Without question the Cherokee Nation owned the Cherokee Outlet in fee simple.

43. Treaty with the Cherokees, Aug. 6, 1846, art. I, 9 Stat. 871. This treaty was to resolve the disputes between the three factions of the Cherokees: the Cherokee Nation (Ross faction), the Treaty Party, and the Old Settlers.

44. Treaty of July 19, 1866, 14 Stat. 799

45. *Id.* at 806.

46. *United States v. Reese*, 27 F.Cas. 742, 744 (C.C.W.D. Ark. 1879) (No. 16,137).

47. See generally *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872) (finding Cherokees owned in fee simple the Neutral Lands which were granted at the same time as the Outlet); *United States v. Rogers*, 23 F. 658, 664 (W.D. Ark. 1885) (finding title to Outlet same as other lands except it was encumbered with salt stipulation); *United States v. Reese*, 27 F. Cas. 742, 744-45 (C.C.W.D. Ark. 1879) (No. 16,137) (finding Cherokee Nation had fee simple title to lands within the Cherokee Nation).

IV. SETTLEMENT OF OTHER INDIANS IN THE OUTLET

A. *Provisions in Treaty of 1866*

After the Treaty of 1846, the Cherokees enjoyed a period of peace and prosperity which lasted until the American Civil War.⁴⁸ It was that war which curtailed the Cherokee Nation's golden age in which the tribe built the Male and Female Seminary, a complex of 150 day schools, a sophisticated court, maintained a mental health facility, an orphanage, and a colored high school, and re-established a bi-lingual printing press and newspaper in the Cherokee and English languages.⁴⁹

It seems difficult to comprehend that land owned in fee simple by the Cherokee Nation could be wrenched away from it within one generation by forces that were at work almost as soon as it was granted the land. At the beginning of the American Civil War, the Cherokees tried to maintain neutrality.⁵⁰ A covenant in the 1846 treaty provided that the federal government would protect the Cherokee Nation from invasion; however, the federal government failed to protect the Cherokees from the Confederacy. After being abandoned by the United States and finding neutrality to be impossible, the Cherokee Nation sided first with the Confederacy.⁵¹ After the Confederate forces withdrew from Cherokee country leaving the Cherokee soldiers starving, many switched sides and enlisted in the service of the United States.⁵² The Cherokees suffered great losses during this period from both Confederate and Union forces as well as from their own factional divisions. In fact, the Cherokees suffered higher casualty rates than the whites of the South.⁵³ Homes and other improvements were burned, stock was destroyed⁵⁴ and crops could not be planted. The Nation was correctly described as a "burnt-over land." After the American Civil War there were 4,000 Cherokee widows and orphans. The Cherokee National Treasury was depleted. There was insufficient funds for the support of the national government, school system and hospitals.

48. For a discussion of the ravages of the war upon the Cherokees, see ROYCE, *supra* note 4, at 210-11.

49. For a discussion of this age of progress, see WOODWARD, *supra* note 32, at 238-52.

50. WOODWARD, *supra* note 32, at 253.

51. ROYCE, *supra* note 4, at 206-07.

52. *Id.* at 207-08.

53. Earl Hess & William L. Shea, *The Cherokees at the Battle of Pea Ridge* (1993) unpublished manuscript, on file with the Cherokee Nation in the Cherokee Nation Justice Office in Tahlequah, Oklahoma.

54. 1865 Commissioner of Indian Affairs Report. The [Indian] agent estimates the losses of the Cherokees in stock alone at two million (\$2,000,000).

It was in this war-ravaged condition that the Cherokees began treaty negotiations in 1866 with what appeared to be a vindictive United States.⁵⁵

The Treaty of 1866 established the predicate for the subsequent loss of the Cherokee Outlet.⁵⁶ In Article 17 the Cherokee Nation ceded in trust to the United States the Neutral lands, a 800,000 acre tract of land in Kansas, which was exchanged with the Cherokees by the United States in the Treaty of 1835.⁵⁷ The Cherokees also ceded the Cherokee Strip, a narrow strip of land, which they had received in the same treaty and which was thereafter included in the state of Kansas.⁵⁸ The Cherokee Nation consented to the inclusion of both lands in the limits of Kansas.⁵⁹

In Article 15, the Cherokee Nation agreed to allow the United States to settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of the 96° meridian. Provisions were made for those tribes wishing to become members of the Cherokee Nation, for those tribes wishing to preserve their own tribal organizations, and for payment to the Cherokee Nation in either situation.⁶⁰ The Delawares, Munsees, and Shawnees did join the Cherokees under the provisions of Article 15; however, the Cherokees refused to allow the Navajos to settle, asserting that they were not civilized within the meaning of Article 15.⁶¹ "This article was [used as] a weapon with which the Cherokees were threatened when they tenaciously held to the Outlet."⁶²

55. See generally ROYCE, *supra* note 4, at 202-211.

56. Treaty of July 19, 1866, 14 Stat. 799. This was the last treaty with the United States. The Treaty of April 27, 1868, was a supplemental article to this one and provided for sale of the Cherokee Neutral Lands.

57. Treaty of July 19, 1866, art. 17, 14 Stat. 799, 804.

58. ROYCE, *supra* note 4, at 226. This land was known as the "Cherokee strip," a term sometimes used erroneously to refer to the Cherokee Outlet. It "was a narrow strip, extending from the Neosho River west to the western limit of the Cherokee lands. The Cherokee domain, as described in the treaty of 1835, extended northward to the south line of the Osage lands. When the State of Kansas was admitted to the Union, its south boundary was made coincident with the thirty-seventh degree of north latitude, which was found to run a short distance to the southward of the southern Osage boundary, thus leaving the narrow 'strip' of Cherokee lands within the boundaries of that state." *Id.*

59. Treaty of July 19, 1866, art. 17, 14 Stat. 799, 804.

60. *Id.* at 803.

61. ROYCE, *supra* note 4, at 234-35.

62. Chapman, *supra* note 19, at 44 n.47.

Article 16 provided for the settlement of friendly Indians, but they were to be located west of the 96° meridian in the Cherokee Outlet. It is this article that was later used to justify the taking of the Outlet. Article 16 provides:

The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one- hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.

Said lands thus disposed of to be paid for to the Cherokee nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The Cherokee nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.⁶³

B. *Extent of Settlement of Indians in Outlet*

"Within seven years after the execution of the Treaty of 1866, all the Cherokee lands west of 96° had been marked off into districts for the permanent settlement of Indians."⁶⁴ In fact, treaties were concluded by the federal government with the Cheyennes and Arapahos and with the Comanches and Kiowas during the autumn preceding the Cherokee Treaty of 1866, indicating that the federal government intended to settle plains Indians on lands in the Cherokee Outlet.⁶⁵ Since the United States had not at this time acquired any legal right to settle other tribes on the lands of the Cherokees, a new reservation was provided for the Kiowas and Comanches by treaty, no portion of which was within the Cherokee limits.⁶⁶ The Cheyennes and Arapahos could not be persuaded to take possession of the tract set aside for them, and they were finally, by Executive Order, located on territory to the southwest and entirely outside the Cherokee limits.⁶⁷

63. Treaty of July 19, 1866, 14 Stat. 799, 804.

64. Berlin B. Chapman, *How the Cherokees Acquired and Disposed of the Outlet, part 2: Indians and Cattle Come to the Outlet*, 15 CHRON. OF OKLA. 205, 206 (1937).

65. *Id.* at 205.

66. ROYCE, *supra* note 4, at 240.

67. *Id.*

Six tribes were actually settled in the Cherokee Outlet: the Osages, Kansas or Kaws, Pawnees, Poncas, Nez Perces, and Otoes and Missouriias. (See Exhibit "A", Map of the Cherokee Nation.) They were settled on the eastern portion of the Outlet, an area more suitable for farming than the western portion of the Outlet; the western portion was more suitable for grazing. The settlements were made through agreements with the United States, not with the Cherokee Nation. The Act of June 5, 1872,⁶⁸ located the Osages on 1,470,059 acres and the Kaws on 100,137 acres at a price established later by the President at 70 cents per acre.⁶⁹ The Pawnees were to pay 70 cents per acre for 230,014 acres provided for them in the Act of April 10, 1876.⁷⁰ The Poncas were removed to the Outlet in 1878 to a tract of 101,894 acres; the Nez Perces, in 1879 to a tract of 90,735 acres; and the Otoes and Missouriias, in 1881 to a tract of 129,113 acres. The price for the land of the Poncas, the Nez Perces, and the Otoes and Missouriias was 47.49 cents per acre.⁷¹

C. *Price To Be Determined by Appraisal of the Outlet*

The amount to be paid by the Pawnees and the other tribes later settled in the Outlet was determined by an appraisal of the Cherokee Outlet authorized by the President and Secretary of the Interior according to Section 5 of the Act of May 29, 1872.⁷² No funds for the appraisal were provided, and the appraisal commission was not appointed until the Sundry Civil Appropriations Act of July 31, 1876,⁷³ provided money for the appraisal. In a letter from Commissioner of Indian Affairs, J. Q. Smith, to members of the Commission to appraise the land, the following instructions were given:

In determining the valuation per acre of these lands, you will take into consideration the fact that these are lands for Indian occupancy and settlement only, and, consequently, less valuable than lands open to white settlement.⁷⁴

The instructions were carefully followed because the report of the appraisal commission acknowledges rather satirically their instructions:

68. Act of June 5, 1872, ch. 310, 17 Stat. 228.

69. ROYCE, *supra* note 4, at 238.

70. Act of April 10, 1876, ch. 51, 19 Stat. 28.

71. ROYCE, *supra* note 4, at 242-43.

72. Act of May 29, 1872, ch. 233, 17 Stat. 165, 190.

73. Act of July 31, 1876, ch. 246, 19 Stat. 102, 120.

74. H.R. EXEC. DOC. NO. 89, 47th Cong., 1st Sess. 12 (1882).

In valuing these lands, it is our impression that the chief difficulty consists in determining the amount of allowance which ought to be made in view of the "fact that these lands are for Indian occupancy and settlement only, and consequently less valuable than lands open to white settlement." We have devoted our attention carefully to the consideration of this subject. Our conclusion is that, in view of this restriction placed upon their use, these lands are worth about one-half as much as they would be if open to settlement by white people. As far as made, our appraisal is, in our judgment, in conformity with that opinion.⁷⁵

A summary of the commission's appraisal and the recommendations of Secretary of the Interior Schurz, were sent by him to President Hayes on June 21, 1879.⁷⁶ The average appraisal of the lands by the commission, including the Pawnee Reservation, was 41 cents per acre. The Pawnee Reservation was valued at 59 cents per acre. By deducting the Pawnee Reservation, the average valuation would be 40.47 cents per acre. Since the Osage lands were purchased from the Cherokees at 70 cents per acre and since the Pawnee tract was similar to the Osage land, Secretary Schurz recommended that the price of the Pawnees' land be fixed at 70 cents per acre and the remainder at 47.49 cents per acre. Schurz's recommendation also agreed with the Cherokee objection to the one-half valuation of the land as "unreasonable and unjust."⁷⁷ President Hayes approved and ratified Secretary Schurz's recommendations on June 23, 1879, under authority of the Act of May 20, 1872.⁷⁸

D. *Requests for Payment for Entire Outlet or Restoration to Cherokee Nation*

The money for the Osage land was transferred on the books of the Treasury from the Osage fund to the credit of the Cherokees. However, there was no more money forthcoming for land on which the other tribes were settled. Each year beginning in 1873, and continuing until 1880, instructions were given the delegates representing the Cherokee Nation in Washington "to urge upon the Government of the United States prompt payment to the Cherokee Nation for its lands lying west of the Arkansas River and south of Kansas, under the

75. Petitioner's Requests for Findings of Fact and Brief at 15, *The Cherokee Nation or Tribe of Indians v. United States*, Docket No. 173, 9 Ind. Cl. Comm'n 162 (April 3, 1961) (on file with author).

76. *Id.* at 30.

77. H.R. Ex. Doc. No. 89, 47th Cong., 1st Sess. 30 (1882).

78. *Id.* at 31.

provisions of the Treaty of 1866.”⁷⁹ In 1881, after a \$300,000 payment had been obtained in 1880,⁸⁰ the delegation was instructed “to secure payment of as large an amount as can possibly be obtained of the price due from said lands, and the *restoration to the full possession and authority of the Cherokee Nation of such of these lands as the United States will not pay for promptly.*”⁸¹

In a letter to the Secretary of the Interior dated January 11, 1882, members of the Cherokee delegation asked for the appraised value of the entire Cherokee Outlet.⁸² They noted that at the time of the Treaty of July 19, 1866, the demand was made that they cede all their land west of 96° because it was needed immediately for the occupancy of other Indian tribes. The Cherokee delegation mentioned that treaties had been entered into with the Arapahos, the Kiowas, the Comanches, and the Cheyennes and that these allotments had never been changed by law. They said that “had our treaty been complied with, we should have been paid fifteen years ago.”⁸³ The Cherokee delegation complained about the appraisal of the land as a single tract; they stated that particular tracts should have been appraised according to whether the land contained timber, valley or pasture land. The Cherokee delegation concluded with the request that the United States “pay principal and interest for what it wants, and restore the remainder to us as it was before the treaty of 1866.”⁸⁴

E. *United States’ Response to Request for Payment*

In response to the letter of the Cherokee delegation, the Commissioner of Indian Affairs, H. Price, replied, by letter of February 17, 1882, that the Arapahos, Kiowas, Comanches, and Cheyennes did not have any title to the Cherokee lands. He further concluded that the Treaty of 1866, did not vest any title to the Cherokee Outlet in the United States. The treaty simply gave the United States the right to settle friendly Indians in that part of the Cherokee country, provided that the Cherokees would sell to such Indians a portion of their country. “It was a condition precedent to the relinquishment by the Cherokees of the right of possession of and jurisdiction over any of said

79. H.R. REP. NO. 3768, 51st Cong., 2d Sess. 22 (1891).

80. Act of June 16, 1880, ch. 234, 21 Stat. 238, 248.

81. H.R. REP. NO. 3768, 51st Cong., 2d Sess. 22, 24 (1891) (emphasis added).

82. *Id.* at 25.

83. *Id.* at 31.

84. *Id.* at 32.

lands that the same were to be sold and occupied."⁸⁵ Price also concluded that the Cherokees had not only been paid for the land settled but had also been overpaid by almost \$35,000.⁸⁶

S. J. Kirkwood, Secretary of the Interior, concurred with the letter of Price and wrote to President Chester A. Arthur:

I entertain considerable doubt whether the terms of the treaty of July 19, 1866, with the Cherokees gives to the United States a complete legal title to the lands "settled" upon and "occupied" by the tribes of friendly Indians, and I suggest that it would be well for Congress to make some provision for acquiring the legal title (subject to the uses and purposes defined in the treaty) of all lands settled upon and occupied, or that may be settled upon and occupied by friendly Indians, as well as such as may be paid for, for such uses and purposes before settlement and occupancy, in case Congress shall determine to make payment for any such.⁸⁷

Instructions in 1882, to the Cherokee delegates to Washington were that they were to get a fair and equitable price, not less than \$1.25 per acre, for the lands that had been ceded to the Pawnees, Nez Perces, Poncas, Otoes and Missourias.⁸⁸ In turn, the Cherokee delegates wrote a letter to H. M. Teller, Secretary of the Interior, stating that they had been instructed to take not less than \$1.25 per acre.⁸⁹ After payment of such, they would execute a deed in trust to the United States for the benefit of the Indians occupying and located upon the lands.⁹⁰ The Cherokee delegation also noted that in a valuation by any fair commission the tracts would be appraised at from \$3 to \$5 per acre and that they had been offered \$1 per acre for the lands lying west of the 98 meridian.⁹¹ A second letter stated that the United States owed the Cherokees \$341,276 for the lands upon which the six tribes had already been settled.

Secretary Teller submitted the letters and other documents to President Arthur, in March 1883, with the following recommendation:

[I]t will be to the interest of the Cherokee Indians, as well as to the interest of the United States, and will settle many questions growing out of this matter, which have been and are now very troublesome and annoying, if an appropriation were made by the Congress in a sum sufficient to pay the Cherokee Nation for the whole body of

85. H.R. Ex. Doc. No. 89, 47th Cong., 1st Sess. 36 (1882).

86. *Id.* at 37.

87. *Id.* at 5.

88. H.R. REP. NO. 3768, 51st Cong., 2d Sess. 22, 24 (1891).

89. H.R. Ex. Doc. No. 54, 47th Cong., 2d Sess. 3 (1883).

90. *Id.*

91. *Id.*

land in question, at the price above fixed by the President, less the sums already appropriated as above shown and applied in payment for a part of said lands.⁹²

On March 3, 1883, Congress appropriated for the Cherokees an additional \$300,000 for lands west of the Arkansas River providing they executed conveyances to the six tribes already occupying the lands.⁹³ This appropriation was in addition to the \$300,000 already conveyed in 1880. The act did not state whether this payment was an additional one for lands conveyed to the six tribes or a payment on the lands that had not been sold. However, U.S. District Judge Isaac C. Parker in 1886, held that the payment was for the lands already conveyed.⁹⁴

It was clear that as of 1883, the United States acknowledged that the Cherokee Nation had full legal title and ownership of the Cherokee Outlet and that the Treaty of 1866, granted the United States a limited and conditional right to acquired portions of the Cherokee Outlet from the Cherokee Nation for certain tribes based on payment at fair market value. This right of purchase by the federal government created a cloud on the title of the Cherokee Outlet.

V. LEASE OF OUTLET TO CHEROKEE STRIP LIVE STOCK ASSOCIATION

A. *First Lease and Early Attempts to Tax Cattle*

Since the Cherokees had been unsuccessful in getting Congress to appropriate money to pay for the Cherokee Outlet, they set about to generate governmental revenues from their ownership of the more than the six million acres. They determined to secure this revenue from leasing the land to cattle owners for grazing. Their first attempt in 1867, was a tax of ten cents per head levied on livestock passing through the Outlet. Although this amount was increased in 1869, ten years elapsed before the Nation imposed a grazing tax.⁹⁵

The United States Senate Committee on Indian Affairs approved the idea of a tax on stockmen grazing herds on Cherokee land in 1870,⁹⁶ and the Department of the Interior endorsed the committee's

92. *Id.* at 2. The price was 70 cents per acre for the Pawnee lands and 47.49 for the remainder of the lands. A payment of \$348,389.46 had already been paid. *Id.*

93. Act of Mar. 3, 1883, ch. 143, 22 Stat. 603, 624.

94. *In re Wolf*, 27 F. 606, 614 (W.D. Ark. 1886).

95. S. Doc. No. 225, 41st Cong., 2d Sess. 1 (1870).

96. *Id.* at 3.

decision in 1872, but it was not until the Senate Judiciary Committee confirmed the Cherokees' right of taxation in 1878, that the Cherokees attempted to collect grazing fees.⁹⁷ L. B. Bell was appointed by the Cherokee Nation as Special Tax Collector in 1879.⁹⁸ He managed to collect only \$1,100.⁹⁹ Cherokee Treasurer D. W. Lipe personally supervised tax collection in the Outlet in 1880, and managed to collect \$7,620.¹⁰⁰ This amount was less than that expected by Chief D. W. Bushyhead.¹⁰¹ However, the Cherokee Nation in 1881 collected over \$21,000 in grazing taxes.¹⁰²

Even more important than the almost threefold increase in collections was the fact that in 1881, the federal government had demonstrated to cattlemen its willingness to act on behalf of the Cherokees under the 1866 treaty.¹⁰³ Commissioner of Indian Affairs Price believed that cattlemen who refused to pay the grazing tax were intruders and should be removed under the provisions of the Treaty of 1866.¹⁰⁴ Secretary of the Interior S. J. Kirkwood concurred and sent orders to the War Department to remove "delinquent cattle graziers" from the Cherokee Outlet.¹⁰⁵ The actions of Price and Kirkwood prompted *The Cherokee Advocate*, the official voice of the Cherokee government, to print the following in January 1882:

[T]hose persons who have cattle grazing on our Strip might as well pay their taxes, and save trouble. Uncle Sam stands by the Cherokees in this matter, and those stockmen who have stock on the Cherokee Strip, and who are kicking against paying taxes to the Cherokee authorities, are simply cutting their own throats—in other words, "no pay, no stay."¹⁰⁶

Their actions may also have been responsible for the almost doubling of the 1882 collection to more than \$41,000.¹⁰⁷

On June 13, 1883, Principal Chief D. W. Bushyhead and the Cherokee delegates in Washington wrote to Secretary Teller:

97. WILLIAM W. SAVAGE, JR., *THE CHEROKEE STRIP LIVE STOCK ASSOCIATION: FEDERAL REGULATION AND THE CATTLEMAN'S LAST FRONTIER* 19 (1973).

98. *Id.* at 20.

99. *Id.*

100. *Id.* at 25.

101. *Id.*

102. *Id.* at 25-30.

103. *Id.* at 30.

104. *Id.* at 29.

105. *Id.*

106. *Id.* at 30.

107. *Id.*

In executing deeds and bringing to a termination the various questions arising from the location of the Pawnees, Poncas, Nez Perces, Otoes, and Missourias and Osages, none of whom were located according to the terms and mode prescribed by the Treaty of 1886, we desire to file with you our notification, as representing the Cherokee Nation, that no further locations or selected tracts can be made until appraised in accordance with the Treaty [of 1866] or the actual value of the land at the time of selecting is agreed upon. We have been offered one dollar an acre for the entire tract for grazing purposes, and shall expect to obtain whatever it is really worth before disposing of it. The Cherokee Nation will not execute further conveyances in whole or in part, save for a fair consideration.¹⁰⁸

This letter was sent about the same time that the cattlemen interested in the Outlet for grazing purposes incorporated as the Cherokee Strip Live Stock Association. The Cherokees leased the Outlet to them for five years at \$100,000 per year.¹⁰⁹

This lease was the culmination of attempts by the Cherokees to generate revenue from the cattle that grazed on the Outlet.¹¹⁰ The Cherokee Outlet lease to the Cherokee Strip Live Stock Association proved to be a prudent management decision on behalf of the Cherokee Nation. With revenues increasing from \$42,000 to \$100,000 annually, the Cherokee Nation could more effectively enforce payment of the lease than enforce payment of the grazing tax or a number of leases with individual stockmen. The Cherokee Strip Live Stock Association provided policing of the use of Cherokee Outlet, and the Cherokee Nation had a political ally in preserving the Cherokee Outlet with the ranching interests of the Cherokee Strip Live Stock Association.

B. *Second Lease*

The Cherokee Strip Live Stock Association again leased the Outlet in 1888, at the expiration of the 1883 lease and again for five years. However, this time the annual rate was \$200,000.¹¹¹ The second lease must have stirred some controversy within the Cherokee Nation.¹¹² Prior to the second lease, several articles which addressed the leasing of grazing land in the Outlet appeared in *The Cherokee Advocate*.

108. Chapman, pt.2, *supra* note 64, at 218.

109. SAVAGE, *supra* note 97, at 60.

110. *Id.* at 58-60.

111. *Id.* at 111.

112. *See id.* at 109-111.

The March 7, 1888, *Advocate* was devoted almost entirely to the leasing of the Outlet. The front page contained the concluding speeches of the debate on the lease of the strip west of the 96° meridian on February 1, 1888.¹¹³ Paschal favored the plan of Robert L. Owen, which was to advertise the 100 or more pastures already fenced for separate bids, since he felt this would be more profitable than the \$125,000 offered by the Cherokee Strip Live Stock Association.¹¹⁴ E.C. Boudinot opposed the multiple leases because the Cherokee Nation courts would have no jurisdiction over them.¹¹⁵ Other articles appeared in the May 23, 1888 issue. One expressed the desire that Chief J. B. Mayes extend the period of time to submit bids for the leasing of the Outlet.¹¹⁶ A second article stated that advertising grazing privileges might "be a question between \$125,000 and two, three or four-hundred-thousand dollars each year."¹¹⁷ That statement was followed by a quote from the *Advocate* of February 1st, 1888:

The Cherokee Nation owns the "Cherokee Strip" in fee simple. There is no doubt about that if a Patent from the United States is worth what it says it is.

Such being the case, the Nation has the right to demand of their Council that the Council shall secure a reasonable profit or interest upon the amount they have invested in those lands.¹¹⁸

C. *Offers to Buy the Outlet*

There were at least two offers to buy the Outlet. The first offer was mentioned in a letter dated October 14, 1886, to Johnson Thompson from Fred W. Strout, in which Strout said that he "expected to visit Council with a gentleman, who if he comes, comes to make the Cherokee Nation a bona fide offer of twelve or thirteen dollars for the entire land west of 96°."¹¹⁹ Whether he meant twelve or thirteen million dollars is not absolutely clear, but he did state a few sentences later that "[t]he sale, even at \$12,000,000.00 at 5% interest, will give

113. *The Concluding Speeches of the Debate on the Lease of the Strip West of 96 Made by Col. E. C. Boudinot, Ridge Paschal and Jess Cochran, February 1, 1888*, THE CHEROKEE ADVOCATE, March 7, 1888, at 1.

114. *Id.*

115. *Id.*

116. *The Grass Question*, THE CHEROKEE ADVOCATE, March 23, 1888, at 2.

117. *Why the Advocate Favors Advertising Grazing Privileges*, THE CHEROKEE ADVOCATE, May 23, 1888, at 2.

118. *Id.*

119. 2 JOSEPH B. THOBURN & MURIEL H. WRIGHT, OKLAHOMA: A HISTORY OF THE STATE AND ITS PEOPLE 892 (1929).

many times more value than the lease.”¹²⁰ A second offer was made on November 28, 1888, by a syndicate of ranchmen who offered to pay the Cherokees \$18,000,000 for their lands in the Outlet if the proper authorities of the Government would consent to the sale.¹²¹

D. *Opposition to Leasing of Outlet*

Opposition to the leasing of the Outlet emerged shortly after the first lease in 1883. S. W. Peel, from the Committee on Indian Affairs, submitted a report to the House of Representatives in April 1884, which questioned the ability of the Cherokees to lease land.¹²² The report also contained a resolution authorizing the Committee on Indian Affairs to “investigate all matters touching the leasing, subleasing, fencing, and inclosing [sic] lands in the Indian Territory.”¹²³

United States Attorney General Garland issued an opinion on July 21, 1885, to the Secretary of Interior that under the statutes of the United States, the Cherokee Nation could not alienate or lease any part of its “reservation” without consent of the federal government.¹²⁴ His opinion was questionable because he relied on the Indian Non-Intercourse Act, last amended in 1834, which required a U.S. treaty or statute as authority for an Indian tribe or nation to alienate or lease lands.¹²⁵ Garland ignored the ruling of the U.S. Supreme Court in *In re the Cherokee Tobacco*,¹²⁶ which provided that a subsequent treaty could supersede an earlier statute and a subsequent statute could unilaterally abrogate an earlier treaty right.¹²⁷ The Treaties of 1835, 1846, and 1866, and the patent for the Cherokee Outlet came after the last amendment of Non-Intercourse Act and each provided for fee simple ownership without imposition of any proviso or condition by the federal government. Even if one accepted the Garland argument that the Non-Intercourse Act applied to the Cherokee Nation, the United States was under a fiduciary duty to the Cherokee Nation to protect the resources of the Cherokee Nation. The United States could not legally abuse its position as trustee for its own benefit.

120. *Id.*

121. S. Mis. Doc. No. 80, 50th Cong., 2d Sess. 20 (1889); Chapman, pt. 2, *supra* note 64, at 225 n.99.

122. H.R. REP. No. 1345, 48th Cong., 1st Sess. 1 (1884).

123. *Id.*

124. Lease of Indian Lands for Grazing Purposes, 18 Op. Att’y Gen. 235, 237 (1885).

125. *Id.* at 236-37.

126. 78 U.S. (11 Wall.) 616 (1870).

127. *Id.* at 621.

In 1871, the relationship between Indian tribes and nations with the federal government fundamentally changed. In 1871, deep in the bowels of a lengthy appropriation bill, the Congress provided that the United States would no longer enter into treaties with the Indian tribes and nations.¹²⁸ Thereafter, the U.S. Congress enacted laws governing the Indian tribes and nations without the structural guarantees of notice to them or their consent. The “no treaty” statute came soon after the United States Supreme Court decision in the case of *In re the Cherokee Tobacco*.¹²⁹ Again, even if U.S. Attorney General Garland’s argument that the Non-Intercourse Act applied to the Cherokee Nation and its fee simple property is acknowledged, it should be noted that Congress unilaterally took away the authority to treat for alienation or leasing of land leaving the only alternative for leasing to be by statute.

Citizens of the Cherokee Nation were not citizens of the United States and had no representation or vote in Congress or institutional voice in the legislation enacted by it. The saying that originated during the debates on the Treaty of New Echota in 1835, that “no amount of Indian rights was worth one white man’s vote” appeared applicable at this time. The possibility of federal legislation respecting the rights of Cherokees secured pursuant to treaty seemed extremely remote.

Opposition to the second lease became even stronger. In July 1888, William M. Springer, Chairman of the House Committee on the Territories, and other members of the committee urged the President, in regard to the proposed renewal of the lease, “to put a stop to the unlawful occupancy of these lands.”¹³⁰ On July 13, 1888, Springer wrote to the President: “Prompt action is required on the part of the Government to prevent the consummation of this illegal proceeding. If a new lease is executed, and money paid thereon, the situation will be greatly complicated, and serious consequences may result.”¹³¹ The Secretary of the Interior on September 28, two days before the expiration of the lease, addressed a letter to Principal Chief Joel Bryan Mayes advising that the United States would recognize no lease or agreement for the possession, occupancy, or use of any of the lands in

128. Act of March 3, 1871, 16 Stat. 544, 566

129. 78 U.S. (11 Wall.) 616 (1870).

130. Chapman, pt. 2, *supra* note 64, at 223.

131. *Id.*

the Outlet.¹³² These actions may be seen as a product of a policy of economic strangulation of the Cherokee Nation by the federal government.

VI. EFFORTS TO ACQUIRE OUTLET FOR WHITE SETTLEMENT

A. *Commission Appointed by the United States to Negotiate with the Indians*

The United States began serious efforts to acquire Indian lands for white settlement in the late 1880's. On March 2, 1889, an act was passed appointing a commission "to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands."¹³³ It also contained the following proviso:

That said Commission is further authorized to submit to the Cherokee nation the proposition that said nation shall cede to the United States in the manner and with the effect aforesaid, all the rights of said nation in said lands upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January nineteenth, eighteen hundred and eighty-nine, and ratified by the present Congress;^[134] and if said Cherokee nation shall accept, and by act of its legislative authority duly passed, ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized as soon thereafter as he may deem advisable, by proclamation open said lands to settlement in the same manner and to the same effect, as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto.¹³⁵

132. Letter of Secretary Vilas on the Right of the Indians to Lease Their Lands to Cattle Companies, CONG. REC. APPENDIX 50th Cong., 2d Sess. 125 (letter dated Sept. 28, 1888); Chapman, pt. 2, *supra* note 64, at 224 & n.94. "On the same day Vilas instructed the Acting Commissioner of Indian Affairs to see that proper notice, by advertisement in some newspaper or otherwise, should be 'brought home' to the knowledge of any and every party negotiating for a lease of the lands." Chapman, pt. 2, *supra* note 64, at 224 n.94.

133. Act of March 2, 1889, ch. 412, 25 Stat. 980, 1005.

134. The price in the agreement with the Creeks on January 19, 1889, was estimated at one dollar and a quarter an acre. Berlin B. Chapman, *How the Cherokees Acquired and Disposed of the Outlet, part 3: The Fairchild Failure*, 15 CHRON. OF OKLA. 291, 291-92 (1937).

135. Act of March 2, 1889, ch. 412, 25 Stat. 980, 1005-1006.

The members of the Commission, appointed June 29, 1889, were General Lucius Fairchild, chairman, General John F. Hartranft, and Alfred M. Wilson.¹³⁶ This Commission, generally referred to as the "Fairchild Commission," proceeded to Tahlequah in July 1889, and was escorted "into Tahlequah with honor."¹³⁷ However, the Commission made no progress in the attempt to acquire the Outlet from the Cherokees.¹³⁸ On September 12, 1889, Fairchild said that he did not believe any progress could be made by the Commission so long as the Cherokees believed that the United States would allow the Outlet to remain under lease simply as a cattle pasture.¹³⁹ He also stated "the Outlet should not in my opinion, be used as a home for Indians if it can be procured for white men at a fair price. It is good land for white men and they should have it if possible."¹⁴⁰ One month later on October 20, 1889, he requested a second U.S. Attorney General's Opinion as to the legality of the leasing of the Cherokee Outlet.¹⁴¹

B. *Cherokee Negotiators Appointed*

It was not until December 3, 1889, that an act was passed by the Cherokees authorizing Chief J. B. Mayes to appoint three people to confer with the Fairchild Commission.¹⁴² Two days later, Mayes appointed W. A. Duncan, D. W. Bushyhead and Adam Lacie.¹⁴³

C. *Reasons Negotiations Were Slow*

Prior to the appointment of the three Cherokees to negotiate with the Fairchild Commission, a number of letters were exchanged by Chief Mayes and the Fairchild Commission. After their appointment by Chief Mayes, the Cherokee representatives also exchanged letters with the Fairchild Commission. These letters reveal several salient reasons for the lack of progress in acquisition of the Outlet by the United States. First, the Cherokees wanted to negotiate a price, while the Commission would offer no more than \$1.25 an acre. Second, the Commission turned over only some of their instructions to the Cherokees in response to the Cherokee request for all of them. Third, the

136. Chapman, pt. 3, *supra* note 134, at 298.

137. *Id.* at 299.

138. *Id.* at 299-301.

139. *Id.* at 303-04.

140. *Id.* at 304.

141. *Id.*

142. *Id.* at 315.

143. *Id.*

Fairchild Commission degraded and tainted the Cherokee fee-simple title to the Outlet. Fourth, when the Cherokees refused the Commission's offer, the Commission made several threats. These threats included a threat to stop revenue from the western land, a threat that the United States might simply claim and take the Outlet, and a threat to settle a horde of "wild and savage" Indians on the land. Additionally, the Cherokees were cut off from appeal because they were told that "during the continuance of this Commission, no delegation from the Cherokee Nation [would] receive a hearing in Washington."¹⁴⁴

It should be clearly emphasized that the Cherokee Nation was not in much of a negotiating position. The Cherokee Nation could not sue the United States to protect its interests. It had no standing in the federal courts, and the United States could invoke its sovereign immunity against the claims for redress by the Cherokee Nation.¹⁴⁵

John Noble, Secretary of the Interior, wrote to President Benjamin Harrison on May 26, 1890, asking for a \$25,000 appropriation to continue negotiations with the Cherokees and other tribes in the Indian Territory.¹⁴⁶ He noted that many changes had been made in the personnel of the Commission and that there had been unavoidable causes of delay, but the Commission was in the field again with some promise of success.¹⁴⁷

D. *Opinion and Proclamation Voiding Leases in Outlet*

Secretary of Interior Noble had already secured an opinion from the Assistant Attorney General Shield of the Department of Interior on October 31, 1889, that held that the leases to the cattlemen were made without authority of law and that the cattle could be removed from the Outlet.¹⁴⁸ United States Attorney General Miller on February 14, 1890, affirmed the Shields opinion and the opinion of Garland,

144. Letter from John L. Adair & D.W. Bushyhead, Cherokee Delegates, to the United States Commission (1889), in *THE CORRESPONDENCE OF 1889, BETWEEN THE UNITED STATES COMMISSION AND CHEROKEE NATIONAL AUTHORITIES, AND A CHEROKEE MEMORIAL AS TO A CESSION OF CHEROKEE COUNTRY WEST OF 96TH MERIDIAN OF LONGITUDE IN THE INDIAN TERRITORY 2-5* (1890). This source was taken from an excerpt from Exhibit No. 46 Before the Indian Claims Commission, *The Cherokee Nation or Tribe of Indians v. United States*, Docket No. 173, 9 Ind. Cl. Comm'n 162 (April 3, 1961). The Exhibit is located in the archives of the Cherokee Cultural Center in Tahlequah, Oklahoma. The excerpt is on file with authors.

145. *Cherokee Nation v Georgia*, 30 U.S. (5 Pet.) 1 (1831).

146. H.R. EXEC. DOC. NO. 400, 51st Cong., 1st Sess. 1 (1890).

147. *Id.*

148. H.R. REP. NO. 3768, 51st Cong., 2d Sess. 19-20 (1891).

his predecessor, that the Cherokee Outlet leases violated federal statutes and were void without federal approval.¹⁴⁹ Using that opinion, President Harrison issued his controversial Proclamation No. 10 three days later on February 17, 1890. The Proclamation stated that “no right exists in said Cherokee Nation under the Statutes of the United States to make such leases or grazing contracts, and that such contracts are wholly illegal and void.”¹⁵⁰ Equally as devastating were the following provisions:

First. That no cattle or live stock shall hereafter be brought upon said lands for herding or grazing thereon; Second. That all cattle and other live stock now on said Outlet must be removed therefrom not later than October 1, 1890, and so much sooner as said lands or any of them may be or become lawfully open to settlement by citizens of the United States; and that all persons connected with said cattle companies or associations must, not later than the time above indicated, depart from said lands.¹⁵¹

The Fairchild Commission’s threat to take away from the Cherokees the revenues from the lease of the Western lands was fulfilled. Thus, the Cherokee Nation’s primary source of income was destroyed by this federal action. By simple federal edict, the Cherokee Nation revenue from lease of the Outlet lands was unilaterally brought to an end. The Cherokee Nation used these funds to operate their seven district governments with their judicial systems, their more than one-hundred and fifty schools including their national seminaries as well as their social services for orphans, the aged and the ill. By economic coercion, the federal government, as trustee of the Cherokee Nation, was determined to force the Cherokee Nation, its ward, to surrender the Outlet in violation of constitutional mandate. The federal government was charged to protect the Outlet for the Cherokees, not to take it for itself.

E. *Other Events Leading to “Agreement”*

Presidential Proclamation Number 10 provided the primary pressure for an “agreement” with the United States to sell the Outlet; however, other events also contributed to establish an overwhelming lobby against the Cherokee Nation. These included the opening of

149. Leases of Indian Lands, 19 Op. Att’y Gen. 499 (1890).

150. Proclamation No. 10, 26 Stat. 1557 (1890).

151. *Id.*

territory, later known as the Territory of Oklahoma, for white settlement.¹⁵² Federal commissions were able to conclude agreements with other tribes for the sale of their lands. The first land run in the Indian Territory area on April 22, 1889, was followed by several other runs.¹⁵³ On May 2, 1890, Congress passed an act to provide a temporary government for the Territory of Oklahoma and to enlarge the jurisdiction of the United States Court in the Indian Territory.¹⁵⁴ Included within this act was a foreshadowing provision that stated "whenever the interest of the Cherokee Indians in the land known as the Cherokee [O]utlet shall have been extinguished and the President shall make proclamation thereof, said Outlet shall thereupon and without further legislation, become a part of the Territory of Oklahoma."¹⁵⁵ The social hysteria of "manifest destiny" and "western expansion" was at its climax.

VII. INEVITABILITY OF LOSS OF THE OUTLET

A. *The Jerome Commission*

On December 3, 1890, a second commission resumed negotiations at Tahlequah.¹⁵⁶ The Commission now consisted of David Howell Jerome, chairman, Alfred M. Wilson, and Warren G. Sayre¹⁵⁷ and is generally referred to as the "Jerome Commission." Armed with Presidential Proclamation Number 10, the Jerome Commission began only two days after the damaging provision in President Harrison's proclamation for the removal of all live stock on the Outlet took effect.¹⁵⁸ Negotiating for the Cherokees were Senator L. B. Bell and Col. William P. Ross.¹⁵⁹ The Jerome Commission, on the second day, offered to the Cherokees \$7,528,442.19, for a cession and relinquishment of all the title, claim, right and interest of the Cherokee Nation in and to lands in the Indian Territory west of the 96°.¹⁶⁰ They refused.

152. WOODWARD, *supra* note 32, at 319.

153. *Id.*

154. *Id.*

155. Territorial Act, ch. 182, 26 Stat. 81, 82 (1890).

156. Berlin B. Chapman, *How the Cherokees Acquired and Disposed of the Outlet, part 5: The Cherokees Concede to a Contract*, 16 CHRON. OF OKLA. 135, 135 (1938).

157. *Id.*

158. *Id.* at 135.

159. *Id.* at 136.

160. *Id.* at 135-36.

A month later on January 10, 1891, the Cherokees also refused the next offer of \$7,970,777.53.¹⁶¹ The Jerome Commission believed that there were two points of disagreement: the Cherokees wanted "the right to sue the United States for any balances in land or money they might claim to be due them under all treaties made since 1828" and the price of the land.¹⁶²

B. *Threats to Take the Outlet Without Consent*

There was also a strong sentiment to take the lands without the consent of the Cherokees.¹⁶³ On January 17, 1891, Charles H. Mansur introduced in the House of Representatives a bill which in effect proposed to appropriate \$7,489,718.72, to pay the Cherokee Nation at the rate of \$1.25 per acre, for any title, claim, or interest they might have to land within what is known as the Cherokee Outlet.¹⁶⁴ The bill further proposed that if "the Cherokees upon due notice refuse to accept the provisions of said act, the President is authorized, within ninety days after ascertaining such refusal, by proclamation to declare said outlet to be incorporated into and be a part of the Territory of Oklahoma, and subject to the laws thereof, and thereafter said lands are to be opened to settlement under the homestead and town-site laws on conditions prescribed."¹⁶⁵

Contained in the January 23, 1891, report of the Committee on Indian Affairs, to whom was referred the bill (H.R. 333) to open to homestead settlement certain portions of the Indian Territory, including the Outlet, were the following statements:

The history of these several treaties, as well as the history and settled policy of the Cherokees, only emphasizes the conclusion reached by your committee: That Congress has the right to terminate this easement and open these lands to white settlement upon terms of equity and right can not be questioned. The question is, shall it exercise its sovereign power in this case without the consent of the Indians.

* * *

161. *Id.* at 140-41.

162. *Id.*

163. *Id.* at 141.

164. *Id.* at 142.

165. S. Ex. Doc. No. 63, 52d Cong., 1st Sess. 1-2 (1892).

To longer dally with the cattle companies and the Cherokees is a criminal waste of time, and to refuse to enact the proposed legislation is a denial of justice to the Government and to the many thousands who would be its beneficiaries.¹⁶⁶

The February 11, 1891, report from the Committee on the Territories to whom was referred the bill (H.R. 13195) to open up to homestead and settlement certain lands in the Indian Territory, including the Outlet, contained the following similar statement:

[T]he demands of the white citizen of the United States, seeking homes for himself and family, are pressing and urgent, your committee believe that there is no other mode of solving the problem except for Congress, acting for the United States, treating these Indians as wards, shall, in the exercise of its judgment and wisdom, declare what is right, and enact a law paying a fair price for these lands.¹⁶⁷

That the Outlet was going to be opened for white settlement with or without Cherokee consent seemed inevitable. However, E.C. Boudinot made clear to the Jerome Commission the Cherokee position during the negotiations. He stated:

If left to us and we were untrammelled to say as our fore-fathers were, we would tell you that we preferred that this land should go down even to five generations from this one. . . and we are powerless and can't help it.

* * *

I can repeat to you that if the United States was to give us the protection to the title that she herself gives we would not consent to part with the title to those lands at the price originally set by us, three dollars. * * * And if we had our way about it and were protected as the government should protect her title that she guarantees we would not sell an acre of this land west of 96° for ten or fifteen—no, nor twenty dollars but circumstance are not such as we would have them: * * * The love of money is not so great among this people that it would part with this land but for the circumstances that surround it. * * * We told you that if we were protected in them by the government we wouldn't sell them at all.¹⁶⁸

C. "Agreement" Reached

In the face of all of the above described forces on December 19, 1891, the Cherokee delegation and the Jerome Commission reached

166. H.R. REP. NO. 3584, 51st Cong., 2d Sess. 5-7 (1891).

167. H.R. REP. NO. 3768, 51st Cong., 2d Sess. 27 (1891).

168. Petitioners's Requests for Findings of Fact and Brief at 244-45, *The Cherokee Nation or Tribe of Indians v. United States*, Docket No. 173, 9 Ind. Cl. Comm'n 162 (April 3, 1961).

an "agreement." The Cherokees agreed to cede all title and claim to lands between the 96° and the 100° for \$8,595,736.12. which equated to \$1.27 per acre. *The Cherokee Advocate* carried the confirmation by the National Council of the agreement. The article stated:

Just as we predicted. On Monday last [January 4, 1892], Council ratified the negotiations ceding the Strip to the United States Government. Before this treaty becomes binding, of course, Congress will have to sanction it, but that will not be a great while. At present, party issues are monopolizing the attention of Congress, and when they are settled, then the matter concerning the Strip will be taken up and disposed of at once.¹⁶⁹

It would appear that the Cherokee delegation, having realized the hopelessness of the forced sale of the Cherokee Outlet, negotiated a provision that meant little to the United States but possibly could save the Cherokee Nation proper and its national government. This provision was for the removal of the "intruders." Intruders were the unwelcome non-citizens residing in the Cherokee Nation. The problem pre-dated the Trail of Tears. The United States agreed to remove the intruders in Article 13 of the Treaty of New Echota and again in Article 15 of the Treaty of 1866. The United States had failed to remove any intruders as of 1890. By 1890, the citizens of the Cherokee Nation numbered 29,599 and the number of illegal intruder whites was 27,176.¹⁷⁰ Soon there would be more intruders than citizens. The Cherokee Nation was swarmed by U.S. citizens who were not under its jurisdiction. The Cherokee Commission, in an effort to save the Cherokee Nation proper and the government of the Cherokee Nation, negotiated a covenant by which the United States agreed to finally remove the intruders as provided in the Cherokee Outlet agreement.¹⁷¹

The effort of the Cherokee representatives was expressed by Principal Chief C.J. Harris in his message to the Cherokee Council on November 8, 1892:

We have not been anxious to sell these lands, and we have known, that so far as the money consideration was concerned, we were not getting a tythe [sic] of their value, but as our tenants had been ejected and we unjustly and uselessly deprived of the revenue derived from the grazing thereon and were constantly importuned and

169. *Editorial*, THE CHEROKEE ADVOCATE, Jan. 6, 1892, at 2.

170. Report from the Select Committee of the Five Civilized Tribes, H.R. Doc. No. 177, 53d Cong., 2d Sess. (1894).

171. Dawes Act, ch. 209, 27 Stat. 612, 641 (1893).

harassed by the Government of the United States for their sale, and our efforts to have the intruders removed having proved fruitless, we finally agreed to the sale, with the hope that our country would be freed from these pests, and the jurisdiction of our courts over citizens be more firmly settled. * * *¹⁷²

The Cherokee Nation acquiesced in the extortion of the President and the Department of Interior to sell the Cherokee Outlet lands in order to preserve the Cherokee Nation proper and its republic.

D. *Cherokee Outlet Act Finally Passed*

The Cherokee Advocate was wrong about quick passage of the Cherokee Outlet bill. More than a year passed. It was not until March 3, 1893, that Congress in the Dawes Act authorized the Secretary of the Interior to purchase the Cherokee Outlet.¹⁷³ Prior to the passage of the Dawes Act, a group of 700 delegates of eager settlers had met at Guthrie, Oklahoma Territory, on January 18, 1893, and passed a resolution praying for the ratification of the treaty providing for the opening up of the Cherokee Outlet for settlement.¹⁷⁴ Also prior to passage, the Senate had passed a resolution to determine the title by which the Cherokee Nation held the Cherokee Outlet and the legality of the agreement between the United States and the Cherokee Nation. Secretary of the Interior, John W. Noble, expressed his view that the Cherokees had only an easement in the Outlet.¹⁷⁵ Another Senate report dealt with recommended changes in sections of the bill before it was ratified and confirmed.¹⁷⁶

An article in *The Cherokee Advocate* noted that changes in the appropriations and intruder portions were being considered and said if the changes were allowed, it would mean that the agreement would "amount to nothing when jist and life of the whole thing are knocked out of it."¹⁷⁷ The article went on poignantly to state the case of the Cherokee Nation:

The intruder provision of the agreement and other concessions [sic] demanded are a part consideration for the lands. The pitiful sum of a \$1.40 per acre for lands that upon the instant of becoming private

172. Petitioner's Requests for Findings of Facts and Brief at 245, *The Cherokee Nation or Tribe of Indians*, Docket No. 173, 9 Ind. Cl. Comm'n 162 (April 3, 1961).

173. Dawes Act of 1893, ch. 209, 27 Stat. 612, 640-43 (1893).

174. S. Mis. Doc. No. 43, 52d Cong., 2d Sess. 1 (1893).

175. S. Ex. Doc. No. 63, 52d Cong., 1st Sess. 8-9 (1892).

176. S. REP. NO. 1079, 52d Cong., 1st Sess. 1-15 (1892, 1893).

177. *What is Said about the Agreement*, *THE CHEROKEE ADVOCATE*, June 1, 1892, at 1.

property, would average from five to fifty dollars, sayins [sic] nothing of town sites, is not what we are after. Safety, protection and absolute equality of rights in the few acres left, and that manner of government the majority are in favor of, are what we want. To part with over 6,000,000 acres of valuable lands at the shameful price of a \$1.40 per acre, and to secure no better condition of affairs at so great a sacrifice, is to double our calamities and to render ourselves more helpless. *Our lands at \$1.40 per acre is the purchase of our deliverance from intruders and protection against them. When these are gone without accomplishing their removal, what will be our condition?*¹⁷⁸

E. *Cession of Outlet*

After the Dawes Act was finally passed, the Cherokee Nation entered into an agreement on May 17, 1893, to cede the Outlet on the terms contained in the act.¹⁷⁹ At Saturday noon on September 16, 1893, the Cherokee Outlet run was made.¹⁸⁰

VIII. POST-OUTLET-RUN CONSIDERATIONS

A. *Removal of Intruders*

The Cherokee Nation relied on its treaties and the statutory covenants of the United States in 1893, to rid itself of the invasion of white intruders. Too Qua-Stee reported in *The Cherokee Advocate* on July 16, 1898, that the Cherokee delegation was insisting on an interview with the Chairman of the Indian Affairs Committee, but he had replied curtly to their request to have the removal of the intruders accomplished pursuant to the Dawes Act. He had stated, "Gentlemen, the government has never fulfilled that agreement, and it never intends to do it." One Department of Interior official found that compliance with the removal covenant would cost no more than \$7,500.¹⁸¹

It is remarkable that a covenant so painfully paid for in the agreement to sell the Cherokee Outlet could be broken so quickly and cavalierly. Even more remarkable is the fact that the U.S. Congress not only did not remove the intruders, but it also vested these squatters property interests five years later in the Curtis Act of 1898.¹⁸² The Curtis Act gave the intruders and squatters preferential purchase

178. *Id.* (emphasis added).

179. Proclamation No. 5, 28 Stat. 1222 (1893).

180. WOODWARD, *supra* note 32, at 320.

181. H. Ex. Doc. 26, 53d Cong., 2d Sess. 5 (1893).

182. Act for the Protection of the People of Indian Territory and for other Purposes, ch. 517, 30 Stat. 495, 500-01 (1898).

rights of town sites, installment loans, due process restriction against ejection, and a short two-year statute of limitation for ejection.¹⁸³

B. *The Effects of the Curtis Act*

The Cherokee Outlet sale was the predicate for plans to open all Cherokee lands to white settlement, allotment of the Cherokee lands and the creation of statehood in Indian Territory. The Curtis Act in 1898, in blatant violation of the Cherokee treaties of 1819, 1928, 1835, 1846, and 1866, provided for allotting the land of the Cherokee Nation in severalty, subjection to state jurisdiction, termination of its courts and the attempted dissolution of the Cherokee Nation government. In the nine years between the Curtis Act in 1898, and Oklahoma statehood in 1907, the Cherokees had their republic and society turned upside down. Prior to the Curtis Act, the Cherokees were masters in their own domain and in control as the majority of the population and as the engineers of infra-structure and government. After Oklahoma statehood, the Cherokees were disenfranchised from government and became an impoverished minority. By 1920, the Cherokees had lost 90% of their land to whites and had become a poverty class of people in their former territory.

C. *Recognition of Tribal Rights and Payment of the Cherokee Outlet*

In 1961, some sixty-six years after the Outlet run, a lawsuit by the Cherokee Nation against the United States was decided in the Cherokee Nation's favor by the Indian Claims Commission. The Cherokee Nation won a judgment for underpayment of the Cherokee Outlet.¹⁸⁴ The Cherokee Nation received a \$14 million judgment which represented a 2/3 undervaluation at the time of the forced sale in 1893. Equally important is the finding of the court as to duress. The Indian Claims Commission concluded:

The Cherokee Nation, which had the fee simple title to the subject tract at the commencement of negotiations under the Act of March 2, 1889, was not inclined to give up its land. For a number of years the petitioner [Cherokee Nation] had been receiving monetary benefits from the lease of these lands to cattle men. This arrangement between the Cherokee Nation and the cattle industry had enjoyed the tacit approval of the Department of the Interior. It was only

183. *Id.*

184. *The Cherokee Nation or Tribe of Indians v. United States*, Docket No. 173, 9 Ind. C. Comm'n 162 (April 3, 1961).

when the Cherokees expressed a reluctance to cede the subject tract that officials of the United States questioned the validity of the leases. The proclamation of the President declaring the leases illegal and void and the order of removal of the cattle from the Outlet were obtained through the efforts of the Secretary of the Interior after the Fairchild Commission had informed him that he believed the Cherokees would not come to terms as long as they could secure revenue from the leasing of the lands.

* * *

The Cherokees became well aware of the constant clamor by the public and Congress for the opening of the lands to white settlement and the evident disposition of Congress to secure the lands with or without the consent of the petitioner [Cherokee Nation].

* * *

[T]here was no arm's length bargaining between the parties to the negotiation. The Cherokees were subject to duress in obtaining from them a cession of the subject tract.¹⁸⁵

IX. CONCLUSION

The sale of the Cherokee Outlet was no sale; it was acquiescence to Presidential, Congressional and bureaucratic extortion to appease the clamor of white greed for land. The Outlet was not taken by physical force but was acquired through the blatant abuse of the trust relationship of Congress with the Cherokee Nation.

The Cherokee Nation's nineteenth century charges of federal duress were sustained by the twentieth century judgment of the United States' own Indian Claims Commission. The facts are no longer disputed.

The greatest tragedy was not that the Cherokee Nation was cheated on the price of the Outlet but that the opening of the Cherokee Outlet for settlement did not satisfy the desires for Cherokee land. The lust specifically continued with the federal government seeking the Cherokee Nation proper. The Cherokee Outlet sale was another step by the federal government to take all of the lands of the Cherokee Nation. Under duress, the Cherokee Nation in a desperate effort to preserve the Cherokee Nation offered to sacrifice the Outlet. That effort failed.

What is there to celebrate in the Cherokee Outlet run? From a Cherokee perspective, isn't it clear why the Cherokee Outlet symbolizes the personification of greed, the abandonment of morality and the

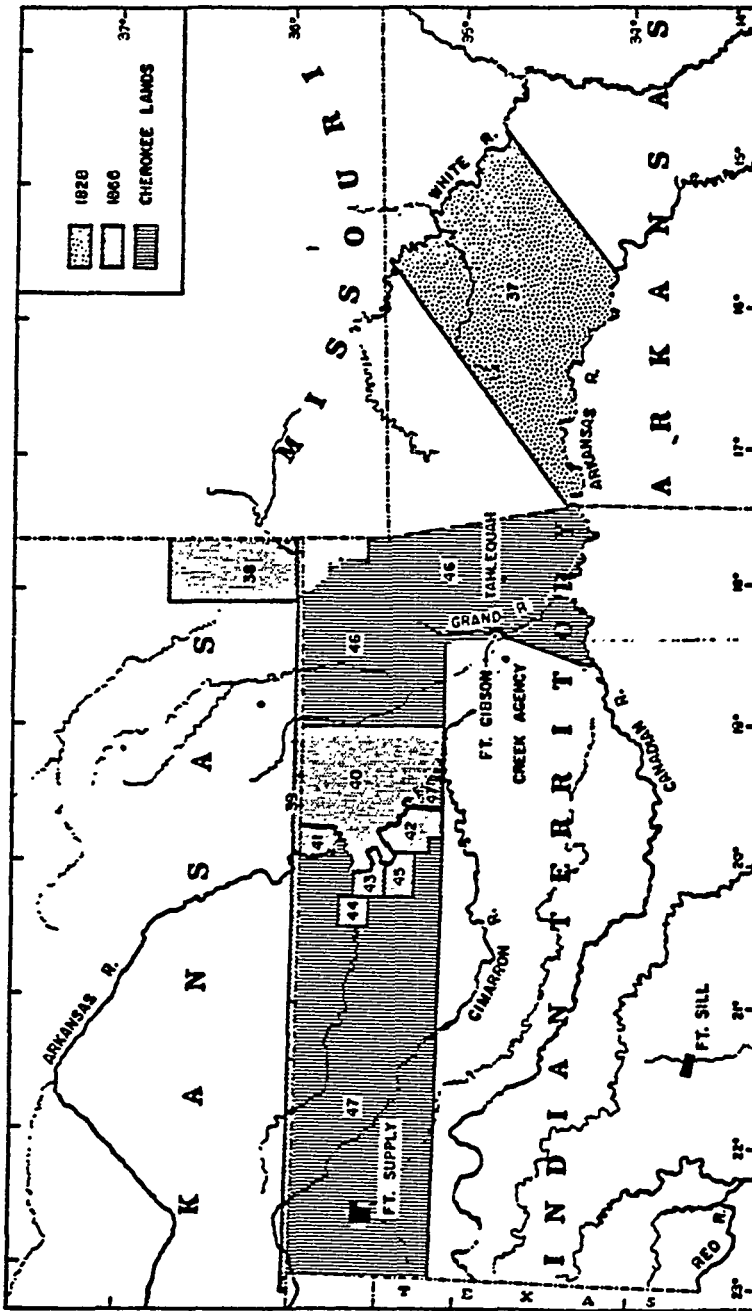
185. *Id.* at 234-35.

denial of law? Isn't the 1993 Cherokee Outlet Celebration of the same school as the 1938 Trail of Tears Commemoration i.e. stubbornly determined ignorance? Why was there no recognition that the Outlet Run was the taking of wrongful spoils from the Cherokee Nation? Why was the Cherokee story not told or even footnoted? Why was there no forum to discuss the issues? Why must there be a celebration and gala entertainment over such a sobering and wrongful event?

The Oklahoma Tourism Department, in its brochure, stated the "United States gave the Outlet to the Cherokees." The historical record is clear, the Cherokees paid for the Outlet with hundreds of thousands of acres of their homelands and thousands of lives lost on the Trail of Tears. This same brochure ignores entirely how the Outlet was acquired and lost, and under what circumstances. The Cherokee side of the story is conspicuously absent.

Some argue that the Cherokee Outlet Centennial Celebration is only a commemoration of the efforts of the pioneers of western Oklahoma to build their communities and the State of Oklahoma. The Oklahoma Department of Tourism titles its Outlet Celebration brochure "Commemorating the Greatest Land Run in the History of the American West." It is not the hard work of the strip settlers being celebrated this year, it is the last physical act of the taking of the Cherokee Outlet from the Cherokee Nation being honored, it is the Land Run that is being glorified. The official Oklahoma tourism brochure reflects the posture and character of the Outlet Celebration.

In view of the history of the Cherokee Outlet, does the Ponca City horseman statute graphically represent a "pioneer spirit" or an "orgy of greed"? Will this generation read these papers and try to understand the Cherokee side of the story? Probably not. Perhaps both our Indian and non-Indian children or their children or their children's children will dust off this paper to learn of the Cherokee side of the story and endeavor to understand and reflect. Simply, the request of the Cherokee Nation is to spread the record before the public and our children so that the wrongs done before will not be done again and so that it is understood that the claims and protests of the Cherokee Nation are just.



The territory originally assigned to the Cherokee Nation of Indians west of the Mississippi, and the boundaries of the territory occupied or owned by them.